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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1943

No. **346**

WASHINGTON BREWERS INSTITUTE, a corporation, et al.,

Petitioner (Appellant below),

VS.

UNITED STATES OF AMERICA,

Respondent (Appellee below).

**BRIEF OF THE STATE OF WASHINGTON
AS AMICUS CURIAE**

THE STATE OF WASHINGTON,
as amicus curiae,

By SMITH TROY,
Attorney General of the State of Washington,

GEORGE DOWNER,
Assistant Attorney General of the State of Washington,

Counsel for the State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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**BRIEF OF THE STATE OF WASHINGTON
AS AMICUS CURIAE**

The STATE OF WASHINGTON files this brief as *amicus curiae* in support of a petition filed by the Washington Brewers Institute, a corporation, et al., petitioning that a writ of certiorari issue to review a judgment entered on the 13th day of August, 1943, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that court entitled "Washington Brewers Institute, et al., appellants, v. United States of America, Appellee, No. 10303," the opinion being reported in 136 F. (2d) — (R. 174).

The liquor authority of the State of Washington has proceeded with the regulation of commerce in intoxicating liquors upon the assumption that the jurisdiction of the state in such matters is exclusive. This assumption has been based upon the interpretations of this Court as rendered in the following cases:

State Board of Equalization v. Young's Market, 299 U. S. 59;

Mahoney v. Joseph Trinner Corp., 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U. S. 391;

Joseph S. Finch & Co. v. McKittrick, 305 U. S. 395; *Ziffin, Inc. v. Reeves*, 308 U. S. 132.

Regulations promulgated by the liquor authority of the State of Washington cover numerous phases of the manufacture, distribution, transportation and sale of intoxicating liquor, including credit restrictions, price posting, trade practices and advertising. Many of these regulations are proposed and intended to place restraints upon competitive business practices permissible and commonplace in other lines of business. It is the opinion of many students of the liquor problem that liquor traffic can be better regulated and controlled and social problems eliminated through the control of the economic factors influencing the persons licensed to engage in liquor traffic. To be more explicit, if licensees engaged in liquor traffic find themselves engaged in a price war where, through competitive practices their businesses may be sacrificed and lost, licensees may become heedless of the laws and regulations imposed for the control of social problems involved in liquor traffic. For this reason, it may be advisable for the liquor control authority of the State of Washington to impose regulations, if not prohibited by a

superior law, which regulations would affect trade practices in violation of the Sherman Anti-Trust Law.

Thus it becomes extremely important for the State of Washington to know whether or not its jurisdiction over the commerce of intoxicating liquor is or may be in any way restricted by national legislation enacted under the commerce clause of the Constitution. While existing laws and regulations of the State of Washington may or may not have the practical effect of fixing uniform prices for the sale of beer, it is readily conceivable that the liquor control authority may feel it advisable to call upon the malt beverage industry in its various phases to develop a uniform price structure as an element in bringing about sounder liquor control.

The Circuit Court of Appeals for the Ninth District, in its opinion, states in part:

"Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of the transportation or importation of intoxicants, the Act is unenforceable."

At the outset of the above statement the Court indicates that should the Sherman Act in any respect become incompatible with the policy of the state law or regulation, it must give way. Later in the same statement it is indicated that only when state laws affecting transportation or importation are incompatible is the Sherman Act unenforceable.

Furthermore, the opinion holds that acts not in violation of State law are still subject to Federal jurisdiction, as indicated in the following language of the Court:

"In 1933 the original status was restored, and in effect the constitutional restriction upon the power of the states was deleted by adoption of the Twenty-First Amendment. Clear and explicit as is its language, that Amendment hardly admits of construction. While it does not in terms transfer power to the states it does free them from a previous constitutional restraint. As a matter of fundamental national law, the Amendment prohibits the transportation or importation of intoxicants into any state or territory for delivery or use therein in violation of the laws thereof. *Interstate commerce in liquor, not in violation of state laws, was left, as before, a matter of national concern.*" (Italics ours.)

Under the Court's conclusion, persons complying with State laws and regulations having to do with liquor traffic would be subject to indictment if those same acts violated any Federal statutes enacted under the Commerce Clause.

It is apparent that the Court's opinion is confusing. The State of Washington should definitely know how far it may proceed in imposing laws or regulations governing the traffic of intoxicants before it runs afoul of the restraints of the Sherman Act. It is apparent to all that no state should require conduct on the part of its citizens that will subject them, because of compliance, to prosecution by the Federal Government.

We therefore join in the petition for a writ of certiorari.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

GEORGE DOWNER,
Assistant Attorney General of the State of Washington,
Counsel for the State of Washington.

